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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN CHARLES HUDDLESTON, Defendant and Appellant.	E068160 (Super.Ct.No. FVI1501063) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Reversed with directions.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson, Allison V. Hawley, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, John Charles Huddleston, of unlawful driving or taking of a vehicle (count 1; Veh. Code, § 10851, subd. (a))[1] and petty theft (count 2; Pen. Code, § 484, subd. (a)).[2] Defendant thereafter admitted suffering a prior felony theft conviction involving a vehicle (Pen. Code, § 666.5), a prior prison term (Pen. Code, § 667.5, subd. (b)), and a prior strike conviction (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). The court sentenced defendant to an aggregate term of imprisonment of seven years.

On appeal, defendant contends his felony conviction must be reduced to a misdemeanor because the prosecution neither alleged nor proved that the value of the vehicle the jury convicted defendant of taking exceeded $950. The People respond that because the trial court's instructions allowed defendant's conviction under section 10851 based upon both legally valid and invalid theories, the matter should be reversed and remanded for retrial. We reverse and remand the matter for further proceedings.

I. FACTS AND PROCEDURAL BACKGROUND

The victim testified that on April 28, 2015, around 8:30 p.m., she parked her 2006 Dodge Durango at a market. As she walked into the market, she saw two men in a white van looking at her. The victim left a laptop and her purse inside the truck. She left her

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[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

[2] The jury convicted defendant on the count 1 offense as an aider and abettor. The abstract of judgment erroneously reflects defendant's conviction was by plea. We shall order the superior court to issue a corrected abstract of judgment.

vehicle unlocked and running as she went inside the market; she paid for a snack, came back outside, and found her truck missing. The victim called the police, who met her at the market.

Two officers were dispatched to the market around 8:40 p.m.; they arrived, went inside the market, and watched the market's surveillance recording several times; the store clerk paused and zoomed in on features in the video for the officers.

The video reflected an older model white van with no license plate pull into the parking lot. A man with head and neck tattoos was driving. He exited the van and went into the store, purchased a few items, and went back to the van. The victim then pulled up next to the van. She exited her vehicle and entered the store. The driver of the van looked at the male passenger in the van. The passenger exited the van, walked over to the victim's vehicle, got inside, and drove out of the parking lot, following the white van south on an adjacent street.

The officers requested a copy of the video, but the clerk informed them he was unable to produce one.[3] One of the officers took still photographs of the surveillance footage with her camera. The photographs showed both the victim's and suspects' vehicles. On the People's motion, the court entered multiple photographs taken by the officer into evidence; the photographs were repeatedly shown to the jury during trial.

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[3] One of the officers testified he returned the next evening to obtain a copy of the surveillance footage, but the clerk informed him it had been erased. The clerk testified the officers did not return to obtain the recording until a week later, at which time the footage had been recorded over.

One of the officers broadcasted a description of the vehicles and suspects to other officers. A third officer located the victim's vehicle approximately 30 minutes later, some four or five miles away, sometime between 9:00 and 10:00 p.m.[4] The third officer waited approximately 15 to 20 minutes to see if the suspects would return. When no one did, he approached the victim's vehicle to begin processing it. At that time he noticed a white van matching the description of the suspects' vehicle come into the parking lot; once it came within 100 yards of the officer it made a U-turn and started exiting the parking lot. The officer pulled the suspects' vehicle over. He made contact with the occupants; there were three persons inside; one was female, the other two were male. Defendant was the driver of the vehicle and his codefendant was the passenger who had driven off in the victim's car.[5]

The first two officers responded with the victim to the location where the third officer found the victim's vehicle. The officers confirmed that the suspect vehicle and suspects matched those they saw in the surveillance video. During a search of the suspects' vehicle, the officers found the victim's now inoperable black laptop, identification, debit card, and keys.

The People charged defendant by felony first amended information with the unlawful driving or taking of a vehicle (count 1; Veh. Code, § 10851, subd. (a)) and

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[4] The third officer testified he found the stolen vehicle around 9:07 p.m. in a grocery store parking lot about two to three miles away from where it had been taken.

[5] Defendant's codefendant is not a party to this appeal.

misdemeanor petty theft (count 2; Pen. Code, § 484, subd. (a)). The People additionally alleged defendant had suffered a prior felony theft conviction involving a vehicle (Pen. Code, § 484, subd. (a)), nine prior prison terms (Pen. Code, § 667.5, subd. (b)), and one prior strike conviction (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). After the jury convicted defendant of the substantive counts, defendant admitted suffering a prior felony theft conviction involving a vehicle (Pen. Code, § 666.5), a prior prison term (Pen. Code, § 667.5, subd. (b)), and a prior strike conviction (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) in return for dismissal of the remaining enhancement allegations. The court declined defendant's invitation to reduce the count 1 offense to a misdemeanor pursuant to Penal Code section 17, subdivision (b).

II. DISCUSSION

Defendant contends his felony conviction must be reduced to a misdemeanor because the prosecution neither alleged nor proved the value of the vehicle the jury convicted defendant of taking or driving exceeded $950. The People respond that because the trial court's instructions allowed defendant's conviction under section 10851 based upon both legally valid and invalid theories, the matter should be reversed and remanded for retrial.[6] We agree with the People that because, due to the court's

[6] Defendant acknowledges that a related issue is currently on review in the California Supreme Court from our nonpublished case, *People v. Bullard*, review granted January 17, 2017, S239488, which frames the issue as: "Does equal protection or the avoidance of absurd consequences require that misdemeanor sentencing under Penal Code sections 490.2 and 1170.18 extend not only to those convicted of violating Vehicle Code section 10851 by theft, but also to those convicted for taking a vehicle without the intent to permanently deprive the owner of possession?" <http:// appellatecases.

instruction of the jury, it is unclear whether the jury convicted defendant of taking or driving the vehicle, the matter must be remanded to allow for retrial.

"Section 10851, subdivision (a), provides, 'Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense . . . .' By its terms, section 10851 is a 'wobbler' offense that may be punished as either a felony or a misdemeanor. [Citations.]" (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 853, fn. omitted (*Gutierrez*).)

"As the Supreme Court has observed, section 10851, subdivision (a), '"proscribes a wide range of conduct."' [Citation.] A person can violate section 10851 by '[u]nlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession.' [Citation.] Section 10851 can also be violated 'when the driving occurs or continues after the theft is complete' (referred to by the Supreme Court as 'posttheft driving') or by '"driving [a vehicle] with the intent only to temporarily deprive its owner of possession (i.e. joyriding)."' [Citation.]" (*Gutierrez, supra*, 20 Cal.App.5th at pp. 853-854.)[7] "Taking a vehicle with the intent to permanently deprive the owner of

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courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2174661&doc_no=S239488&request_token=NiIwLSIkXkg%2BWyBVSCJNSENIUDw0UDxTICBOVzJRMCAgCg%3D%3D&bck=yes> (as of April 8, 2019).

[7] The current version of CALCRIM No. 1820 lists three ways of violating Vehicle Code section 10851: (1) joyriding; (2) taking with intent to temporarily deprive;

possession is a form of theft, and a defendant convicted of violating section 10851 with such an intent has suffered a theft conviction. [Citations.] On the other hand, posttheft driving and joyriding are not forms of theft; and a conviction on one of these bases is not a theft conviction. [Citations.]" (*Gutierrez, supra,* 20 Cal.App.5th at p. 854.)

"In November 2014 the voters passed Proposition 47, part of the Safe Neighborhoods and Schools Act, effective November 5, 2014, designed to reduce the punishment for certain drug and theft offenses by reclassifying them from felonies to misdemeanors. [Citations.] Among other things, Proposition 47 reclassified a variety of grand theft crimes to petty theft offenses when the value of the money, labor, real or personal property taken did not exceed $950. [Citation.]" (*Gutierrez, supra,* 20 Cal.App.5th at p. 854.) "By its terms, Proposition 47's new petty theft provision, [Penal Code] section 490.2, covers the theft form of the Vehicle Code section 10851 offense." (*People v. Page* (2017) 3 Cal.5th 1175, 1183.) Thus, "obtaining an automobile worth $950 or less by theft constitutes petty theft under [Penal Code] section 490.2 and is

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and (3) theft with intent to permanently deprive, only the latter of which is characterized as a theft offense. (*Gutierrez, supra,* 20 Cal.App.5th at p. 854.) The "joyriding" statute, Penal Code section 499b, now prohibits only the unlawful taking of bicycles, motorboats, or vessels. The current version of CALCRIM No. 1820, which was not in existence at the time the court instructed the jury in this case, contains language that requires a jury to find both that the defendant intended to *permanently* deprive the owner of the vehicle and that the People prove the vehicle was valued at more than $950 in order to convict a defendant of the felony *theft* offense under Vehicle Code section 10851.

punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged." (*Id*. at p. 1187.)

Here, because the jury instructions did not delineate between the nontheft and theft forms of violating section 10851, the jury's conviction of defendant on the count 1 offense does not reflect on what form of the offense the jury convicted defendant. The court instructed the jury with CALCRIM No. 1820 as follows: "The defendants are charged in Count 1 with unlawfully taking or driving a vehicle. [¶] To prove that a defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took or drove someone else's vehicle without the owner's consent; [¶] AND [¶] 2. When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time. [¶] A *taking* requires that the vehicle be moved for any distance, no matter how small." Therefore, the jury instructions permitted the jury to convict defendant of the nontheft forms of section 10851, a valid theory, but also of the taking, the theft form of the offense, which would be legally invalid on the current instructions because they did not require a permanent taking and a value of the stolen vehicle of more than $950. On these instructions, the jury could have convicted defendant solely of the nontheft, joyriding version of the offense if it found defendant aided and abetted only a temporary deprivation of the victim's vehicle for the purpose of facilitating the petty thefts.

The court in *Gutierrez* faced an identical situation. There, the court determined: "Although the record cannot support a guilty verdict for felony vehicle theft, the problem

with [defendant's] felony conviction is not the sufficiency of the evidence but jury instructions that failed to adequately distinguish among, and separately define the elements for, each of the ways in which section 10851 can be violated. As *Page* made clear, when a violation of section 10851 is 'based on theft,' a defendant can be convicted of a felony only if the vehicle was worth more than $950. [Citation.] It is also necessary to prove the vehicle was taken with an intent to permanently deprive the owner of its possession—'a taking with intent to steal the property.' [Citation.] The court's instructions in this case included neither of those essential elements for a felony theft conviction. But, as discussed, section 10851's prohibitions sweep more broadly, punishing not only taking but also driving without the owner's consent and with the intent either to permanently or temporarily deprive the owner of possession. Neither an intent to steal nor the value of the vehicle is an element of a felony offense of posttheft driving or joyriding. [Citations.]" (*Gutierrez* (2018) 20 Cal.App.5th at p. 856, fns. omitted.)

The *Gutierrez* court concluded: "The court's instructions here allowed the jury to convict Gutierrez of a felony violation of section 10851 for stealing the rental car, even though no value was proved—a legally incorrect theory—or for a nontheft taking or driving offense—a legally correct one. 'When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground.' [Citations.]" (*Gutierrez* (2018) 20 Cal.App.5th at p. 857.)

Defendant contends "*Gutierrez* is inapposite because it involved two separate and distinct driving incidents with a substantial break in between both events." (*Gutierrez, supra*, 20 Cal.App.5th at pp. 850-852.) Assuming arguendo that the defendant in *Gutierrez* did drive the vehicle which was the subject of the section 10851 charge on "two separate and distinct" occasions on the same day,[8] we do not view those facts as dispositive of the applicability of the rule announced in *Gutierrez*. Rather, as *Gutierrez* noted, the dispositive factor underlying its holding was the failure of the court to properly instruct the jury on the various theories upon which it could convict defendant under section 10851 such that no determination of which theory the jury convicted defendant could be made. (*Gutierrez, supra*, at p. 857.) In the instant case, even if defendant only drove, or aided and abetted the driving of, the vehicle once, the court's jury instructions leave us without any way to determine upon which theory the jury convicted him, i.e., whether the jury convicted defendant of joyriding or theft. Thus, as in *Gutierrez*, the matter must be reversed and remanded for retrial.

Citing *In re D.N.* (2018) 19 Cal.App.5th 898, defendant also argues that because joyriding was not supported by the evidence, any remand for retrial would violate constitutional principles of double jeopardy. In *In re D.N.*, the minor contended the People failed to establish the value of the stolen vehicle. The People argued that section

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[8] We note that the defendant in *Gutierrez* took a rental car from his girlfriend without permission, returned to her home, but left the car running and never exited the car. Defendant took off again and was arrested after committing several traffic infractions. (*Gutierrez, supra*, 20 Cal.App.5th at p. 850.) This factual scenario does not appear reasonably susceptible being described as "two separate and distinct" occasions.

10851 did not come within the ambit of Proposition 47, but if it did, then they should be permitted to retry the case. (*In re D.N.*, *supra*, at p. 901.) The court noted: "The flaw in the People's argument for a remand on the value of the stolen vehicle is that the law changed nearly two years before D.N. committed her offenses, and over two years from the date of the contested jurisdiction hearing. Proposition 47 and Penal Code section 490.2 were effective on November 5, 2014. [Citation.]" (*Id.* at p. 903.) "The People were thus on notice as of November 5, 2014, that vehicle theft under Vehicle Code section 10851 was to be a misdemeanor unless the value of the stolen vehicle exceeded $950." (*Ibid.*)

However, the court noted that there were conflicting opinions with respect to whether "Proposition 47 and Penal Code section 490.2 applied to Vehicle Code section 10851 thefts." (*In re D.N.*, *supra*, 19 Cal.App.5th at p. 903.) Nonetheless, the court reasoned: "The People should have been well aware the value of the stolen vehicle was relevant on whether the offense was a felony. The People chose instead to gamble, and lost their bet, that the Supreme Court would find Vehicle Code section 10851 outside the ambit of Proposition 47 and Penal Code section 490.2." (*Ibid*.) Thus, since the People were "on notice of the relevant change in the law [they] [were] not, therefore, entitled to retry [the minor] to prove the value of the stolen vehicle. To permit retrial on this point would violate double jeopardy. [Citations.]" (*Id*. at pp. 903-904.)

The court in *Gutierrez* recognized the holding in *In re D.N.*, but disagreed with it by observing that *Page* had yet to be decided at the time the court decided the case and

the majority of the then-published decisions on the issue held that section 10851 did not come within the ambit of Proposition 47: "Given the conflicting authority on the issue and the prevailing decisions in the Courts of Appeal at the time of Gutierrez's trial, we decline to fault either the trial court or the prosecutor for failing to correctly anticipate the outcome of cases pending before the Supreme Court. This is not an instance where either the court or the prosecutor misinterpreted or failed to follow established law." (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 858, fns. omitted.) "Although Supreme Court review was ultimately granted in each of these cases, and in one instance the Court of Appeal granted a rehearing after the time of Gutierrez's trial, as of February 2016, three then-published decisions had held Proposition 47 did not apply to section 10851 and only one had held it did." (*Id.* at p. 858, fn. 11.)

The *Gutierrez* court also observed that *In re D.N.* did "not explain why it criticizes the prosecutor for failing to predict the *Page* holding when presenting evidence at the jurisdiction hearing but not the juvenile court judge who exercised his discretion at the disposition hearing and found the vehicle theft to be a felony." (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 858, fn. 12.) "[T]he appropriate remedy for the error here is to allow a retrial on the felony charge if the People can in good faith bring such a case." (*Id*. at p. 858.)

In *In re J.R.* (2018) 22 Cal.App.5th 805, review granted August 15, 2018, S249205, the parties agreed "that the minor's felony adjudication for violating Vehicle Code section 10851 cannot stand because it is not clear from the record whether the

adjudication was theft-based or nontheft-based and the People neither alleged nor proved that the value of the car exceeded $950." (*Id.* at pp. 819-820.) The minor contended the court should reduce the felony conviction to a misdemeanor. (*Id*. at p. 820.) The People requested a remand for further findings or a new jurisdictional hearing. (*Ibid*.)

The court held that double jeopardy did not bar a new jurisdictional hearing because "Proposition 47 did not amend Vehicle Code section 10851, subdivision (a) and, as the ensuing Courts of Appeal opinions show, its impact on that provision was not obvious. Nor are we convinced that *Page* was foreseeable at the time of the minor's adjudication in late fall of 2015. At that time, no Court of Appeal had held that Proposition 47 applied to Vehicle Code section 10851, subdivision (a)." (*In re J.R.*, *supra*, 22 Cal.App.5th at p. 822.) "In the meantime, Court of Appeal opinions with conflicting holdings regarding the application of Proposition 47 to Vehicle Code section 10851 were issued and our Supreme Court granted review in two of those cases. Thus, even assuming prosecutors were on notice of the potential relevance of vehicle valuation evidence at the time of D.N.'s adjudication, that was not the case a year earlier at the time of the minor's adjudication." (*Ibid*.)

In *People v. Bussey* (2018) 24 Cal.App.5th 1056, review granted September 12, 2018, S250152, the court agreed with *Gutierrez* that where "'jury instructions that failed to [distinguish adequately] among, and separately define the elements for, each of the ways in which section 10851 can be violated[,]'" absent any express evidence on which theory the jury based its verdict, reversal and remand for retrial was appropriate. (*People*

v. Bussey, *supra*, at pp. 1061-1062, quoting *Gutierrez*, *supra*, 20 Cal.App.5th at p. 856.) Likewise, in *People v. Jackson* (2018) 26 Cal.App.5th 371, the court agreed "with the *Gutierrez* and *Bussey* courts that, at least where the evidence would have also permitted conviction on a theory not requiring proof of the vehicle's value, the issue is properly analyzed as one of instructional error. [Citations.]" (*Id*. at p. 378, fn. 7.)

We find the reasoning of *Gutierrez, In re J.R.*, *Bussey*, and *Jackson* persuasive. At the time of defendant's trial, Courts of Appeal were divided on whether Proposition 47's petty theft provisions applied to section 10851.[9] The majority of published appellate decisions concluded they did not. (*Gutierrez, supra,* 20 Cal.App.5th at p. 858.) Moreover, the fact defendant never raised this issue below further highlights its unforeseeability.

We acknowledge that during her closing argument, the prosecutor stated: "[I]t's quite clear from the evidence [that codefendant] was the one that actually took [the victim's] vehicle and actually drove it away, and he did not intend to give it back to her." "[I]t was clear this was not their property, that it was belonging to the owner of the Durango they had just stolen." However, despite the prosecutor's statements, the jury instructions did not limit the jury to finding that defendant *stole* the vehicle. Rather, if anything, the jury instructions would have appeared to have limited the jury to find defendant guilty of *joyriding* because they did not require the jury to find that he intended

[9] Defendant's conviction and sentencing came before the decision in *Page*, July 30, 2015, and March 11, 2016, respectively.

to permanently deprive the victim of the vehicle and did not require the jury to find the victim's vehicle was worth more than $950. Moreover, as discussed above, there was sufficient evidence from which the jury could have determined that defendant did not intend to permanently deprive the victim of the vehicle. Therefore, since sufficient evidence supported both theories and the jury was instructed with both a valid theory for finding defendant guilty under section 10851, joyriding, and an invalid theory, theft, the matter must be, and is, reversed and remanded for retrial.

III. DISPOSITION

The judgment on count 1 is reversed. Defendant's sentence is vacated in its entirety. The matter is remanded for further proceedings consistent with this opinion. On remand the People may either accept a reduction of the conviction on count 1 to a misdemeanor with the court to resentence defendant in accordance with that election or the People may retry defendant for a felony violation of section 10851. The trial court is directed to correct the abstract of judgment to reflect defendant's conviction by jury trial rather than by plea.

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McKINSTER
Acting P. J.

We concur:

SLOUGH
J.

FIELDS
J.